

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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June 15, 2004

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Counsel for Defendant-Debtor
Post Office Box 249
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Subject: *Patricia J. Warkenthien v. Brett E. Warkenthien*
(*In re B. Warkenthien*), Adversary No. 03-3004;
Chapter 7; Bankr. No. 03-30055

Dear Counsel:

The matter before the Court is Plaintiff's request for costs and attorney's fees associated with the above-named adversary proceeding and Defendant-Debtor's objections thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, attorneys' fees will not be allowed. Costs will be allowed to the extent provided by statute.

Summary. Plaintiff prevailed against Defendant-Debtor in a nondischargeability action under 11 U.S.C. § 523(a)(15). Thereafter, she filed a Bill of Costs for \$1,775.92. Costs itemized included the adversary filing fee, court reporter fees, copies, faxes, postage, and long distance telephone charges. The Bill essentially reflected all costs that Plaintiff's attorney had incurred regarding the adversary proceeding.

Plaintiff also filed a motion to have her attorney's fees paid. She sought \$9,094.40, which included \$504.40 in sales tax. She relied upon Fed.R.Bankr.P. 7054(a) and Fed.R.Civ.P. 54(d)(2) for the fees sought.

Defendant-Debtor objected to both requests. Regarding the Bill of Costs, he challenged the reasonableness of Plaintiff's proposed copying charge of \$.50 per page, and he argued that postage, long distance charges, and fax transmissions are not allowable costs. Regarding the fee application, Defendant-Debtor argued that 11 U.S.C. § 523(d) does not contemplate an award of fees to a prevailing creditor, and he argued that the sum sought was not reasonable when the amount of debt sought to be declared nondischargeable was only \$6,800.00.

In her replies, Plaintiff agreed that § 523(d) did not apply. However, she did not identify another federal statute that contemplated an award of her attorney's fees. She also said the amount sought was not unreasonable because the debts at issue totaled approximately \$14,800.¹ Plaintiff presented equitable arguments for an attorney fee award based on Defendant-Debtor's conduct.

Discussion - Costs. Section 1920 of Title 28 provides:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation

¹ The Court shares Defendant-Debtor's concern that the fees charged by Plaintiff's counsel may not have been reasonable in light of the amount of the subject debts sought to be declared non dischargeable. The Court, however, does not have the power to review the amount of the fees in this case since none are being awarded as a cost. Compare *In re Dean R. Walters, Jr.*, Bankr. No. 98-50064, slip op. (Bankr. D.S.D. Dec. 8, 1998)(Debtor's counsel's unreasonable fees related to a nondischargeability action were reduced under 11 U.S.C. § 329(b)).

of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

Under this statute, the Court "must carefully scrutinize the claimed costs and the support offered for them." *Chester v. Northwest Iowa Youth Emergency Center*, 158 F.R.D. 626, 632 (N.D. Iowa 1994)(cites therein).

As stated in § 1920, copy costs are reimbursable if the copy was "necessarily obtained for use in the case." This provision covers exhibits used at trial or attached to pleadings regarding dispositive motions. *Sphere Drake Insurance, P.L.C. v. Trisko*, 66 F.Supp 2d. 1088, 1093-94 and 1094 n.9 (D. Minn. 1999). This allowed cost, however, does not include copies of a party's pleadings, copies served on the opposing party, copies transmitted to the client, copies produced for discovery, or copies made for the party's counsel's own convenience. *Id.*; *UNI-Systems, Inc. v. Delta Air Lines, Inc.*, 2002 WL 505914, slip op. at 3 (D. Minn. March 28, 2002).

For depositions or transcripts costs to be awarded under § 1920, the deposition must not have been taken purely for investigative purposes. *Goss International Corp. v. Tokyo Kikai Seisakusho, Ltd.*, 2004 WL 1234130, slip op. at 8 (N.D. Iowa June 2, 2004)(cites therein), or merely to assist with discovery. *UNI-Systems, Inc.*, 2002 WL 505914, slip op. at 2. The necessity of the deposition or transcript must be viewed in light of the facts known at the time of the deposition. *Goss International Corp.*, 2004 WL 1234130, slip op. at 8. The inquiry is whether the deposition reasonably seemed necessary at the time it was taken. *Id.*

Several typical office expenses are not included under § 1920. These include postage, express mail services, telephone costs, and other administrative expenses usually associated more with office overhead, not litigation. *UNI-Systems, Inc.*, 2002 WL 505914, slip op. at 3. Fax charges are also not included under § 1920. *Pinkham v. Camex, Inc.*, 84 F.3d 292, 294-95 (8th Cir. 1996).

When § 1920 and the relevant case law are applied here,

Plaintiff is entitled to costs of \$210.25. This includes the filing fee of \$150.00 and \$60.25 for copies of exhibits related to dispositive motions and used at trial at a reasonable reimbursement rate of \$.25 per page. The other copying costs and the other general office costs sought by Plaintiff for faxes, postage, and long distance phone charges are not recoverable. Also not recoverable are any costs for deposition transcripts. No transcripts were used at trial, and none were shown to be taken other than to assist with discovery.

Discussion - Attorneys' Fees. Federal Rule of Bankruptcy Procedure 7054(a) states that Fed.R.Civ.P. 54(a)-(c) applies in adversary proceedings. Thus, the provision of Rule 54(d) regarding costs and attorneys' fees is excluded from application. Instead, Fed.R.Bankr.P. 7054(b) states, in pertinent part:

The Court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides.

As applied, costs under Rule 7054(b) are considered to include only filing fees and limited other costs, but not generally attorneys' fees. *In re Robertson*, 105 B.R. 504, 507 (Bankr. D. Minn. 1989).

It has been and will continue to be this Court's practice to follow the American Rule and only award attorneys' fees as costs when so provided by applicable statute, contract, or a prior order. No bankruptcy statute or other federal statute specifically entitles Plaintiff to attorney's fees in this case. *Kelly v. Golden*, 352 F.3d 344, 352-53 (8th Cir. 2003); *Hicks v. First National Bank of Harrison (In re Hicks)*, 65 B.R. 980, 984-85 (Bankr. W.D. Ark. 1986). In nondischargeability actions, that will usually mean that attorneys' fees will only be awarded under § 523(d), which does not apply here, under Fed.R.Bankr.P. 9011(c) when sanctions are appropriate, or under the "bad faith" exception to the American Rule respecting conduct during the litigation. *Kelly*, 352 F.3d at 352 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (discussing the "bad faith" exception)). In this adversary proceeding, there has been no showing that any of Defendant-Debtor's pleadings were filed in bad faith, and there has been no showing that Defendant-Debtor acted in bad faith during this litigation. Accordingly, each party shall bear their own attorneys' fees.

An appropriate order and judgment will be entered. The

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allowed fees and costs will be awarded in conjunction with Plaintiff's motion to amend to include as nondischargeable the marital debt to Direct Merchants, which is being granted.

Sincerely,

/s/ Irvin N. Hoyt

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: adversary file (docket original; serve parties in interest)